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No. 20104

United States
COURT OF APPEALS
for the Ninth Circuit

TILLAMOOK CHEESE & DAIRY ASSOCIATION,

Plaintiff-Appellant,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, H. S. DIXON, GAYLORD P. SHIVELY, JOHN S. CRAVEN, JR., OTTO SCHILD and WARREN A. McMINIMEE,

Defendants-Appellees.

APPELLANT'S OPENING BRIEF

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

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JURISDICTIONAL STATEMENT

Tillamook Cheese & Dairy Association, hereinafter referred to as "T. C. & D. A.," brought this action against Tillamook County Creamery Association, hereinafter referred to as "T.C.C.A.," H. S. Dixon, Gaylord P. Shively, John S. Craven, Jr. and Otto Schild, in the District Court for the District of Oregon (R. 1). The first amended complaint added defendant Warren A. McMinimee (R. 92). The second amended complaint (R. 380) states two claims:

Title 15, U. S. Code, by reason of Section 17 of Title 15, U. S. Code, and Section 291 of Title 7, U. S. Code (*Capper-Volstead Act*) (R. 70-71).

Plaintiff filed a motion for injunctive relief under Rules 7(b) and 65 of the Federal Rules of Civil Procedure to which motion plaintiff attached a number of exhibits and the affidavits of George Milne, then president of plaintiff, and of Hans Leuthold, a member of plaintiff's Executive Committee and now president of plaintiff, as well as a copy of the memorandum decision of Judge William G. East which had just been handed down in a case between substantially the same parties[2] (R. 13-38). The parties exchanged memoranda with respect to said motion for injunctive relief (R. 47, 50), and defendants submitted an affidavit of H. S. Dixon, manager of T.C.C.A. and one of the defendants (R. 54), with exhibits attached thereto (R. 61-63). A hearing was held on July 28, 1964, on plaintiff's motion for injunctive relief with testimony given by H. S. Dixon, W. Rogers Higgins, Allen Thomas, George Milne, Basil Tone, Hans Leuthold and Robert M. Kerr (Tr. 36-155). The Court ordered the motion for injunctive relief continued pending disposition of defendants' motion to dismiss (R. 75). After the complaint was dismissed with leave to plaintiff to amend, the Court held the motion for injunctive relief as "presently moot," but under

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[2] This memorandum opinion was followed by findings and conclusions and judgment for T.C. & D.A. against T.C.C.A., was appealed to this Court (No. 19,565) and this Court sustained the judgment below, *Tillamook County Creamery Association* v. *Tillamook Cheese & Dairy Association,* Slip Sheet Opinion April 7, 1965, amended on rehearing (denied) May 20, 1965; 345 F.2d 158.

advisement awaiting plaintiff's proposed amended complaint (R. 103).

Defendants' motion to dismiss was allowed by the Court on grounds cited in the consolidated memorandum decision (R. 85-90), with leave on the part of plaintiff to file an amended complaint

> "joining appropriate additional parties defendant, pursuant to the Federal Rules of Civil Procedure" (R. 91).

Thereupon, plaintiff filed an amended complaint stating two separate claims, joining one additional defendant, Warren A. McMinimee (R. 92).

Its first claim charges the defendants with

> "violations of the anti-trust laws of the United States, by their agreement, combination or conspiracy, among themselves, and with others, in restraint of interstate trade or commerce, and further, by their combination or conspiracy, among themselves, and with other persons, to monopolize a certain part of interstate trade or commerce." (R. 92).

And more specifically:

> "Beginning on or about January 1963, and continuing uninterrupted thereafter up to and including the date of the filing of this amended complaint, the defendants, well knowing the facts herein alleged, have:
>
> 1. Restrained interstate trade or commerce in the production and the marketing of milk, cheese and other dairy products by contracting, combining or conspiring with each other and with Carl H.

Cadenau, of Portland, Oregon, and other persons, and defendant corporation within itself by and through its officers, agents and employees in restraint of such trade or commerce, contrary to Section 1 of the Sherman Act (15 U.S.C.A., Section 1) and;

2. Combined or conspired with each other, and with Carl H. Cadenau, and other persons, to monopolize a certain part of said trade or commerce, contrary to Section 2 of the Sherman Act (15 U.S.C.A., Section 2); (R. 93).[3]

The second claim of the amended complaint sought to recover damages for violation of Section 2 of the Sherman Act by reason of "the attempt of each defendant severally, and also jointly, to monopolize a certain part of interstate trade or commerce" (R. 98).

Following the filing of the amended complaint defendants moved for summary judgment on the ground "that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law" (R. 108). This motion was based on the pleadings and memorandum decision of the Court of August 6, 1964 (R. 85), attached affidavits of Carl H. Cadonau (R. 110), H. S. Dixon (R. 113) and W. A. McMinimee (R. 117), the attached memorandum of law and oral testimony of Messrs. Cadonau, Dixon and McMinimee "to be presented at the hearing if the Court desires to hear such testimony" (R. 108).

Plaintiff then filed a counter-affidavit of George

[3] Carl H. Cadenau is the general manager of Alpenrose Dairy, Inc. (R. 110).

Milne (R. 139), then president of plaintiff, T.C.&.D.A., and additional memoranda of law in opposition to defendants' motion for summary judgment (R. 263, 307).

Prior to the Court's ruling on defendants' motion for summary judgment, plaintiff filed certain interrogatories to defendant Warren A. McMinimee (R. 143) which were answered in part (R. 298), to defendant Tillamook County Creamery Association (R. 156) which were not answered, to defendant Otto Schild (R. 161), answered in part (R. 316), to defendant Gaylord P. Shively (R. 167), answered in part (R. 321), and to defendant John S. Craven, Jr. (R. 206), answered in part (R. 326). Defendant objected to those interrogatories propounded and not answered; plaintiff later withdrew all those interrogatories without prejudice, pending resolution of the present appeal.

Defendants moved for a protective order "limiting plaintiff's discovery to whether Warren A. McMinimee and Carl Cadonau illegally conspired as outside parties with Tillamook County Creamery Association to injure plaintiff, as alleged in the complaint" (R. 175). Memoranda of law were presented with respect to this motion by defendants (R. 176-205) and by plaintiff (R. 213-262).

Plaintiff also submitted additional affidavits in opposition to defendants' motion for summary judgment, executed by certain officers and members of plaintiff: Hans Leuthold (R. 330), Del Mayer (R. 338), Joe Donaldson (R. 340), Glenn Johnston (R. 343), Floyd Woodward (R. 345), Vern Lucas (R. 346), George

Milne (R. 349), Barbara Milne (R. 362), Clem Hurliman (R. 367), Basil Tone (R. 372), and Evelyn Pallin (R. 374).

Depositions were taken by the plaintiff in Tillamook of some eight witnesses; the depositions of Warren A. McMinimee and Carl H. Cadonau were taken in open Court on November 30, 1964 (R. 377; Tr. 239-306); the Court then entered an order allowing the plaintiff to further amend its complaint by adding Alpenrose, Inc. as "co-conspirator," in lieu of Carl H. Cadonau, its general manager, individually (R. 378).

Plaintiff then filed its second amended complaint by permission of the Court (R. 380). That complaint differed from the first amended complaint only in naming Alpenrose Dairy, Inc., an Oregon corporation, as a "co-conspirator" with respect to violations of the antitrust laws alleged in the first claim of such complaint, alleging injury and claiming damages.

The filing of the second amended complaint was followed by renewed motions by defendants for summary judgment based on the pleadings, affidavits of defendants Dixon, McMinimee and of Carl H. Cadonau, the answers to interrogatories of Warren A. McMinimee, Gaylord Shively, Otto Schild, John Craven, Jr., and the depositions of McMinimee and Cadonau taken before the Court on November 30, 1964 (R. 391; Tr. 239, 268). Defendants also filed a reply memorandum to plaintiff's earlier memoranda and supplemental memoranda (R. 393).

The Court allowed defendants' motion for summary

judgment as to the first claim of the second amended complaint and denied summary judgment as to the second claim (R. 409, 437). Defendant Warren A. McMinimee thereafter filed a motion for summary judgment in his favor as to the second claim of plaintiff's second amended complaint, with respect to him, "on the ground that there is no issue as to any material fact and that he is entitled to judgment as a matter of law" (R. 411).

The Court allowed this motion and granted summary judgment in favor of Warren A. McMinimee as to the second claim of plaintiff's second amended complaint (R. 441-442).

It should be noted that an answer and counterclaim was filed by the defendants, except Warren A. McMinimee (R. 417), and trial by jury was demanded by defendants (R. 431).

Plaintiff appeals from both

(1) Summary judgment in favor of all defendants as to plaintiff's first claim, i.e. alleged violations of the conspiracy provisions of Sections 1 and 2 of the Sherman Act, and

(2) Summary judgment in favor of Warren A. McMinimee as to plaintiff's second claim, i.e. alleged violation of Section 2 of the Sherman Act by an attempt to monopolize.

B. Summary of the Parties' Contentions about Matters of Fact in Dispute.

(1) Plaintiff contends and alleges[4] that defendant T.C.C.A. was during all pertinent times an agent for producers of milk, cheese and other dairy products, engaged in grading and marketing such products at wholesale in interstate trade or commerce [second amended complaint's (first claim) paragraph IV (R. 381), and (second claim) paragraph II (R. 386)].[5]

This is denied by the defendants in their answer and counterclaim (paragraph II(c); R. 418).

(2) Plaintiff contends and alleges, inter alia:

(a) Defendants have arbitrarily denied to the plaintiff, on or about January 16, 1963, its vested right to representation on the Board of Directors of defendant T.C.C.A. and forced plaintiff to terminate its membership in defendant T.C.C.A., which theretofore had been the grading and marketing agent for substantially all of plaintiff's cheese and other dairy products (R. 382, 387);

(b) Defendants have refused to pay over to plaintiff a credit balance due from T.C.C.A. to the plaintiff in the sum of $771,527.06 representing plaintiff's so-called Grade A Milk Account, the further sum of $711,-127.92 representing plaintiff's so-called Cheese Account, and the further sum of about $300,000.00 representing

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[4] The allegations of the complaint were verified by affidavit (R. 33).

[5] All of plaintiff's contentions and allegations are made with respect to both the first and second claims asserted in the second amended complaint, except as hereafter specifically noted.

plaintiff's so-called Feed Department Account (R. 382, 387);

(c) Defendants have intimidated or attempted to intimidate, and threatened a major creditor of the plaintiff, to limit or destroy the availability of loan capital and to destroy plaintiff's line of credit (R. 382, 387);

(d) Defendants have intimidated or attempted to intimidate and induced or attempted to induce plaintiff's suppliers and patrons to refuse to sell to and deal with plaintiff (R. 383, 387);

(e) Defendants have threatened to destroy plaintiff's market for its products, by inducing or attempting to induce present or potential agents, brokers and customers of the plaintiff to boycott and refuse to deal with the plaintiff or in plaintiff's products (R. 383, 387);

(f) Defendants have harrassed the plaintiff directly and indirectly, by threat of vexatious litigation and by pursuing a policy to prevent plaintiff from marketing its production of milk, cheese and other dairy products (R. 383, 387);

(g) Defendants have pursued a policy to effect a reduction in plaintiff's production in order to enhance or achieve a monopolistic position in favor of T.C.C.A. and to the damage and injury of the plaintiff, and have caused, *inter alia*:

(i) a reduction in the production of cheese by plaintiff from about 20,000 pounds per day to about 14,000 pounds per day;

(ii) a reduction in plaintiff's daily Grade A milk market quota of 71,000 pounds per day;

(iii) an accumulation, as of about May 1, 1964, of over three and one half million pounds of cheese in plaintiff's warehouses, which plaintiff was unable to market in the ordinary course of business by reason of the alleged acts of defendants (R. 383, 388).

These contentions and allegations are all denied by defendants in paragraph III of their answer and counterclaim (R. 418).

(3) Plaintiff also contends and alleges that since January, 1963 the defendants have knowingly restrained and plotted to restrain interstate trade or commerce in the production and marketing of milk, cheese and other dairy products by contracting, combining or conspiring with each other and with other persons including, but not necessarily limited to Alpenrose Dairy, Inc., an Oregon corporation, acting by and through Carl H. Cadonau of Portland, Oregon, and the defendant cooperative corporation within itself by and through its officers, agents and employees in violation of Section 1 of the Sherman Act (R. 381-382); that they also combined with each other and with other persons, including, but not necessarily limited to, Alpenrose Dairy, Inc., acting by and through Carl H. Cadonau, to monopolize a certain part of said trade or commerce, in violation of Section 2 of the Sherman Act (R. 382).

Plaintiff further contends that defendants prevented and limited plaintiff from receiving raw products from its patrons and suppliers for the production of milk, cheese and dairy products, and that defendants prevented and impaired to a substantial degree the plain-

tiff from marketing its said milk, cheese and other dairy products in interstate trade or commerce.

All this is denied in part by defendants' answer and counterclaim (R. 418); it is further denied as to Alpenrose Dairy, Inc., and Carl H. Cadonau individually, by Carl H. Cadonau, in his affidavit of September 11, 1964 (R. 112), is denied on behalf of defendant Dixon and T.C.C.A. by affidavit of defendant Dixon of September 11, 1964 (R. 116), and by defendant Warren A. McMinimee in his affidavit of September 11, 1964 (R. 117).

(4) Plaintiff contends and alleges that prior to January, 1963, plaintiff T.C.&D.A. was a member in good standing of defendant T.C.C.A., enjoyed a substantial and profitable business for its patrons and members, having supplied a major and continually increasing portion of milk and cheese graded and marketed by and through the agency of defendant T.C.C.A., and but for the matters alleged in the complaint by T.C.&D.A., plaintiff T.C.&D.A. contends and alleges it would have continued to enjoy a substantial and profitable business for its patrons and members (R. 383, 386).

This is denied by the defendants in paragraph II(d) of their answer and counterclaim (R. 418), except that defendants admit that until September 23, 1963, plaintiff was a member of defendant T.C.C.A.

(5) Plaintiff contends and alleges that plaintiff was forced to terminate its membership in defendant T.C.-C.A. by reason of certain intolerable acts of defendants, and when plaintiff so left T.C.C.A., T.C.C.A. kept

possession and control of some 4 million pounds of plaintiff's cheese, which plaintiff contends T.C.C.A. had since sold and for which T.C.C.A. and Dixon have refused to account to plaintiff (R. 384, 386). This is denied by defendants' answer and counterclaim, paragraph II(e) (R. 418).

(6) Plaintiff contends and alleges that its investment in its plant and production facilities, worth over one million dollars, was being depreciated by reason of defendants' alleged conduct in violation of the Sherman Act (R. 385, 386). This is denied in defendants' answer and counterclaim (R. 418).

(7) Plaintiff further claims severe damage and injury at the hands of the defendants, in excess of two million dollars. This is denied by defendants in its answer and counterclaim (R. 418), which in turn claims Five Million dollars compensatory and Five Million dollars punitive damages against T.C.&D.A. (R. 423).

(8) Plaintiff contends that Alpenrose Dairy, Inc. of Portland is an "outsider" as far as the co-operative "family" of T.C.C.A. is concerned, and was a party to the combination or conspiracy with which plaintiff charged defendants in violation of Sections 1 and 2 of the Sherman Act. A suggestion of testimony which would be offered at trial, tending to support the allegation of plaintiff relative to Alpenrose Dairy, Inc.'s participation in the alleged combination or conspiracy with the defendants, is found in the affidavits of Hans Leuthold (R. 333-337), Del Mayer (R. 338-339), Joe Donaldson (R. 340-341), and Vern Lucas (R. 346-348).

That Alpenrose Dairy, Inc. of Portland is such an "outsider," is not disputed by defendants or by Alpenrose Dairy, Inc. (R. 110-112, 398); defendants, and Alpenrose Dairy, Inc. deny the alleged combination or conspiracy (R. 110-112, 115, 117).

(9) Plaintiff contends that defendant Warren A. McMinimee acted not merely as lawyer for T.C.C.A. and the other individual defendants, but was an independent actor, in effect, to the extent that he is alleged to have actively participated in the formulation of the policy and conduct of T.C.C.A.[6] directed against plaintiff, beginning at least as early as January, 1963, that defendant Warren A. McMinimee is alleged to have counselled and actively participated with T.C.C.A. in organizing the Tillamook Fluid Milk Shippers Association, a direct competitor of plaintiff, acted as its attorney (R. 305-306, 324) to the damage of plaintiff, while plaintiff was still a member of T.C.C.A., and while being paid legal fees by T.C.C.A. (and thus, indirectly by plaintiff); plaintiff also charges defendant McMinimee with attempts to destroy, by threats of litigation and other means, the source of credit to plaintiff at certain pertinent times; that instead of merely carrying out policies and desires of the Board of T.C.C.A. as its attorney, plaintiff ascribes to defendant Warren A. McMinimee the leadership of a faction of the Board of T.C.C.A. These contentions are found in the pleadings, and the affidavits of Del Mayer (R. 338-339), Joe

[6] T.C.C.A. at that time was the marketing agent for plaintiff and other producers in Tillamook County; T.C. & D.A. left T.C.C.A. in September, 1963.

Donaldson (R. 340-341), Glenn Johnston (R. 343-344), Floyd Woodward (R. 345), Vern Lucas (R. 346-348), George Milne (R. 349-361), Barbara Milne (R. 362-366), Clem Hurliman (R. 367-371), Basil Tone (R. 372-373), and also in testimony offered by plaintiff at a pre-trial hearing (Tr. 94-153). These contentions, if offered as testimony upon trial, would tend to support plaintiff's contention that defendant McMinimee was more than a mere attorney for defendant T.C.C.A.

For example, Vern Lucas, a member of the Board of Directors of T.C.&D.A., the plaintiff, and during plaintiff's membership in T.C.C.A. a representative of T.C.&D.A. to T.C.C.A.'s Board of Directors, alleges in his affidavit that defendant Warren A. McMinimee advised a vote on the T.C.C.A. Board on a crucial issue while two T.C.&D.A. representatives, George Milne and Hans Leuthold were out of the room (R. 347). George Milne in his affidavit (R. 350) states that defendant Warren A. McMinimee personally aided in T.C.C.A.'s effort to boycott T.C.&D.A. in its fledgling marketing activities, approved the sending out by Mr. Dixon, General Manager of T.C.C.A., "of the many threatening letters to the trade, and I am advised that Mr. McMinimee publically acknowledged that it was wrongful to do so, but that they would proceed to send the letters out anyhow." Attached to this affidavit by Mr. Milne is correspondence between defendant Warren A. McMinimee and the First National Bank of Oregon, Portland, in which Mr. McMinimee, *inter alia,* accuses the Bank of conspiring with T.C.&D.A. to the damage of T.C.C.A. by lending to T.C.&D.A. Mr. Milne quotes

from the Bank's response of January 21, 1964, through its attorneys, addressed to Mr. McMinimee:

> "The impression we have acquired from your recent letter is that you are not actually interested in this phase of the matter and that the real basis for your objection and criticism is that the Bank is lending any money at all to T.C.&D.A." (R. 350, 358).

Plaintiff contends, in short, that defendant Warren A. McMinimee is an individual, an independent actor and not a cooperative, not a potential member of T.C.-C.A., and that he has forfeited such immunity as he might have enjoyed as a mere lawyer and counsel to his clients, upon trial. Plaintiff contends that Warren A. McMinimee has played a dominant role, wearing in fact a number of hats in this drama in Tillamook County where the defendants, hand in hand with Alpenrose Dairy, Inc., have, so plaintiff alleges, tried to cause the economic downfall, destruction and demise of plaintiff.

All these contentions are denied, in effect, Mr. McMinimee claiming to have at all times been solely the lawyer for T.C.C.A. (R. 117), while also acting as counsel for other co-operatives, members of T.C.C.A. (Tr. 245) and the Tillamook Fluid Milk Shippers Association (R. 305).

C. Questions Raised on Appeal.

This is an appeal from two summary judgments; thus, the questions before this Court are:

Do the pleadings, depositions, and affidavits, and the testimony in the record of the pre-trial proceedings show any genuine issue as to any material fact to be resolved by trial? —

(1) With respect to all defendants as to plaintiff's first claim, i.e. the alleged conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and the alleged conspiracy to monopolize in violation of Section 2 of the Sherman Act; and

(2) With respect to defendant Warren A. McMinimee as to the second claim, i.e. the alleged attempted monopolization in violation of Section 2 of the Sherman Act.

Basic to the resolution of at least the first question in the case at bar is the scope of the immunity granted an agricultural cooperative from the proscriptions of the antitrust laws, i.e.

(a) Is this immunity available to defendants if they have gone beyond *lawfully* carrying out the *legitimate* objectives of T.C.C.A. and

(b) If defendants have combined or conspired with Alpenrose Dairy, Inc., an "outsider," admittedly not a cooperative or even a potential member thereof, — is the immunity otherwise enjoyed by labor unions and agricultural cooperatives lost to these defendants?

If the answer to either (a) or (b) is yes,—and appellant submits it is "yes" to both,—the question is then posed: Can the premise to both questions be re-

solved by the summary judgment on the record here, or must the premise, i.e.

(a) Did defendants keep *within* the limits of *lawfully* carrying out the *legitimate* objectives of the cooperative, T.C.C.A., and

(b) Did defendants in fact combine or conspire with Alpenrose Dairy, Inc.,[7] and possibly others, as alleged by plaintiff and denied by defendants and Alpenrose Dairy, Inc.

be resolved on trial?

The question raised by plaintiff's appeal from the summary judgment in favor of defendant Warren A. McMinimee is whether a lawyer for an agricultural cooperative can be personally liable for actively participating in an alleged violation of the antitrust laws.

The question could further be raised whether the allegation of defendant Warren A. McMinimee's participation in the alleged combination or conspiracy would also vitiate the cooperatives' exemption by reason of defendant McMinimee's status as an "outside party"; this question, we think, will not need to be resolved since the alleged participation of Alpenrose Dairy, Inc., admittedly an "outside" party,[7] is sufficient to overcome the statutory "immunity" of T.C.C.A.

The question before this Court is not whether or not

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[7] Alpenrose Dairy, Inc., is admitted by defendants to be an Oregon corporation, commercially and privately owned, distinct from and not part of T.C.C.A., clearly not a co-operative or potential member of T.C.C.A. (R. 398). See Cadonau's deposition, Tr. 268-306, and his affidavit (R. 110-112).

defendants have in fact violated the antitrust laws in any particular. The question is whether the record shows disputed material contentions or whether it shows that summary judgment was justified by a record clearly showing what the truth as to all material matters of fact is, that no genuine issue remains for trial and that the plaintiff-appellant is not cut off from its right to a day in Court.

Appellant asks this Court to give it an opportunity to prove its claims of violation of the antitrust laws by combination or conspiracy as well at attempted monopolization against all defendants. Appellant asks this Court, of course, to look at the record in the light most favorable to plaintiff-appellant, the party opposing summary judgment, and to conclude that summary judgment should not have been granted in this case, and that plaintiff may claim its day in Court.

SPECIFICATION OF ERRORS

1. The trial court erred in allowing the motion of defendants for summary judgment as to the first claim of plaintiff's second amended complaint (R. 437).

2. The trial court erred in allowing defendant Warren A. McMinimee's motion for summary judgment as to the second amended complaint (R. 441).

SUMMARY OF ARGUMENT

It is axiomatic that summary judgment must be used sparingly, and appellant urges this Court to reverse the trial Court's orders of summary judgment.[8]

Summary judgment, as a means of terminating litigation, is particularly inappropriate in a complex antitrust case where there is not one, but a plethora of disputed matters of fact for resolution by trial.

Here, these disputed "facts", or, the parties' contentions about matters of fact, are set forth in this brief in some detail; perhaps unnecessarily prolix, because the trial Court, on the same record, denied summary judgment as to the attempted monopolization charge, except as to defendant McMinimee. As is noted in this brief elsewhere, the factual allegations are practically identical in support of the charge of attempted monopolization under Section 2 of the Sherman Act, which the trial Court permitted to go to trial, and the conspiracy charges under Sections 1 and 2 of the Sherman Act which were struck by summary judgment.

The trial Court distinguished between the *Borden* v. *U. S.*[9] rule, as pointed out in the *Sunkist*[10] case, and

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[8] Except where specifically distinguished, the Summary of Argument and Argument are intended to relate to the appeal of both:
(1) Summary judgment for all defendants as to the first claim of plaintiff's second amended complaint; and
(2) Summary judgment for defendant Warren A. McMinimee as to the second claim of plaintiff's second amended complaint.

[9] 308 US 188 (1939).

[10] 370 US 19 (1962).

the *Maryland and Virginia Milk Producers*[11] case.

Sunkist holds a co-op or group of co-ops is immune from the conspiracy provisions of the antitrust laws for *interorganizational* activities, while affirming the validity of

Borden, which holds agricultural co-ops liable for conspiracy with outsiders, and

Maryland and Virginia Milk Producers Association, which holds agricultural co-ops liable for monopolization or attempted monopolization, even *without* outsiders.

The trial judge, in granting summary judgment, apparently overlooked the "outsider," in this case, Alpenrose Dairy, Inc.[12] The trial judge apparently accepted the self-serving declaration of Alpenrose Dairy's general manager that it did not combine or conspire with the defendants, ignored plaintiff's affidavits to the contrary, and thus deprived plaintiff of a full and fair chance to a trial of all issues.

The trial Court, in granting summary judgment to defendant McMinimee, overlooked plaintiff's accusations under oath, and apparently accepted the self-

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[11] 362 US 458 (1960).

[12] Appellant does not overlook that defendant McMinimee could qualify as an "outsider" or "independent actor", but merely suggests, arguendo, that a question of fact, to be resolved at trial, exists as to whether or not defendant McMinimee is an "independent actor" and would thus qualify to take T.C.C.A. out of the *Sunkist* rationale. No such question exists with respect to Alpenrose Dairy, Inc. on this record.

serving declarations by defendants and Mr. McMinimee to the contrary.

This is error. Appellant submits, not only is a lawyer as such not immune from being held to account under the antitrust laws, but, as a lawman, an officer of the courts, an attorney should be held to at least as high, if not higher standard of lawfulness as a layman. Certainly nowhere have we found a lawyer, as such, exempt from the proscriptions of the antitrust laws.

Appellant respectfully urges reversal of the summary judgments because

1. They are clearly improper because of many disputed issues of fact in the record which must be resolved by trial;

2. They are peculiarly inappropriate in an antitrust case, such as this one, and the ends of justice would be better served by trial than by summary disposition;

3. All leading cases, under Rule 56 (c) of the Federal Rules of Civil Procedure, and in the antitrust field, support reversal, as will be shown below, and all doubts as to facts or allegations about matters of fact in the record to date must be resolved in this instance, and before this tribunal, in appellant's favor; and

4. Neither T.C.C.A., nor any other agricultural cooperative, is free, by any statute or Court's decision known to appellant, to act as a predator in the market place, to plan and scheme to destroy competition for its gain and to its competitor's

damage; such conduct is unlawful; and such conduct is by this cause laid at defendants' door. The charges must be tried.

ARGUMENT

1. Numerous genuine issues of fact are raised on the record, by the pleadings and affidavits, which cannot be resolved by self-serving declarations of defendants and their alleged co-conspirators.

The complaint alleges an agreement, combination or conspiracy between T.C.C.A., certain of its officers or directors, Mr. McMinimee, and Alpenrose Dairy, Inc., and others outside T.C.C.A. (R. 380). Self-serving statements of some of the alleged co-conspirators (R. 110-118) that they were not involved in any conspiracy, without opportunity for cross examination, and before full pretrial discovery, are insufficient to support a finding that there was no conspiracy, no combination and no agreement. Mere statements by affiants that they acted only in their official capacities as agents of the association are likewise unimpressive. Mr. McMinimee's affidavit (R. 117-118) claims that he acted only in his capacity as attorney for T.C.C.A. Yet, the plaintiff names him as an individual, the logical inference being that plaintiff desires to prove that on certain relevant and material occasions, Mr. McMinimee acted as an individual and outside the scope of his employment as attorney. This applies as well to other named individual defendants.

Defendants and Alpenrose Dairy, Inc., one of the alleged co-conspirators, deny plaintiff's charges. There

has been no trial; however, the issues are factual and disputed and unresolved.

A trial,—not summary disposition,—is the proper way to resolve these issues. *Poller* v. *Columbia Broadcasting System,* (1962) 368 U.S. 464, 7 L. Ed. 2d 458; *White Motor Co.* v. *U. S.*, (1963) 372 U.S. 253, 9 L. Ed. 2d 738.

That such issues exist is implicit in the Court's denial of summary judgment as to plaintiff's claim of attempted monopolization (the second claim of plaintiff's second amended complaint) against the same defendants, except Warren A. McMinimee (R. 437-438, 441-442).

Summary judgment may not be entered where there is a material issue as to any material fact. *Dredge Corporation* v. *Penny* (9 Cir. 1964) 338 F.2d 456.

A quotation from *Jackson Tool & Die, Inc.* v. *Smith* (5 Cir. 1964) 339 F.2d 88, is particularly appropriate in the case at bar:

> "Summary judgment can be granted only if there is no genuine dispute as to any material fact. This requirement is to be strictly construed so as to insure that factual issues will not be determined without the benefit of the truth-seeking procedures of a trial. (F.R.Civ.P. 56(c), 28 U.S.C.A.). This case bristles with triable issues of fact, precluding the sustaining of either a motion to dismiss or a motion for summary judgment for any party to this appeal." 339 F.2d, at 91.

2. Special exigencies of antitrust litigation are recognized by the Supreme Court as limiting advisability of summary judgment in antitrust cases.

Faith in summary proceedings is declining rapidly. In *Poller* v. *Columbia Broadcasting System,* supra, the Supreme Court not only recognized the general disenchantment with summary proceedings but held forth on the particular weaknesses of that procedure in complex antitrust litigation. In reversing a summary judgment in a treble damage action based on alleged violations of Sections 1 and 2 of the Sherman Act, the Supreme Court held:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Rule 56 (c), Fed Rules Civ Pro. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth it, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 88 L. Ed. 967, 972, 65 S. Ct. 724 (1944).
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> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary

procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of 'even handed justice.'" 368 U.S. at 468, 473, 7 L. Ed. 2d at 461, 464.

This teaching by the Supreme Court superbly fits the present case. Defendants' motion for summary judgment should not have been granted; it should be reversed.

3. T.C.C.A. has no immunity as an agricultural cooperative from the conspiracy provisions of the anti-trust laws when it combines or conspires with outsiders.

Defendants moved for summary judgment in reliance on *Sunkist Growers, Inc. et al* v. *Winkler & Smith Citrus Products Co. et al.*, (1962), 370 U.S. 19, 8 L. Ed. 2d 305 (R. 396), and Sec. 6 of the Clayton Act[13] and

[13] *Clayton Act, Section* 6:
"That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or being conducted for profit, or to forbid or restrain individual members of such organizations *from lawfully carrying out the legitimate objects thereof;* nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." [15 U.S. Code, § 17] (emphasis supplied).

Section 1 of the Capper-Volstead Act,[14] which statutory provisions are claimed as basis for immunity of agricultural cooperatives from the conspiracy provisions of the antitrust laws.[15]

The trial court erred in granting summary judgment for defendants as to plaintiff's conspiracy charges, ap-

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[14] *Capper-Volstead Act, Section* 1:—Authorization of Associations; Powers.

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate commerce and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: * * *" (7 U.S. Code, § 291).

[15] Plaintiff does not know whether defendant T.C.C.A. qualifies as a Capper-Volstead cooperative, at this time, for two reasons: (1) Plaintiff is not certain that the purchase and sale of nearly 1,000,000 pounds of Minnesota cheese (R. 27-30, Tr. 37-48) is a legitimate objective of T.C.C.A. under Capper-Volstead language which exempts only those cooperative associations which are engaged in "processing, preparing for market, handling, and marketing . . . products of persons so engaged" as farmers, planters, ranchmen, dairymen, nut or fruit growers. (2) Plaintiff is uninformed as to defendant T.C.C.A.'s tax exempt status as a nonprofit agricultural cooperative. Plaintiff calls attention to the financial statements released by T.C.C.A. for its accounting period ended March 31, 1964 (R. 220-262). The statements were prepared (without audit) by Peat, Marwick, Mitchell & Co., (R. 222) defendant T.C.C.A.'s C.P.A.s, who felt obligated to note [note 4, to the financial statements (R. 227)] that by reason of certain ". . . acts and resolutions adopted . . . and subsequent rescinding thereof . . ." T.C.C.A.'s status as an exempt cooperative is in question.

These matters may have to be determined on trial. For ultimately, whether defendant T.C.C.A. qualifies as a Capper-Volstead Cooperative will determine whether they are entitled to any exemption, whatsoever, from the antitrust laws.

pellant submits, upon a reading of the case principally relied upon by defendants, the *Sunkist* case.

Sunkist is the most recent judicial pronouncement concerning the scope of immunity granted agricultural cooperatives; in *Sunkist* the Supreme Court found the interorganizational dealings among three cooperatives immune from the conspiracy provisions of the antitrust laws, but—significantly—concluded:

> "Suffice it to say that our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, United States v. Borden Company, 308 US 188 (1939), and for monopolization, Maryland and Virginia Milk Producers Association v. United States, 362 US 458 (1960)." 370 U.S. at 30.

Appellant submits that defendants here are charged with conspiracy with an "outside group": Alpenrose Dairy, Inc. (R. 380-382). "There is no question that Alpenrose Dairy, Inc. is distinct from and not part of the TCCA organization" admit defendants (Reply Memorandum, R. 398).

Thus, the vitality of *United States* v. *Borden Company* (1939), 308 U.S. 188, 84 L. Ed. 181, affirmed by the *Sunkist* decision, limiting "immunity" to interorganizational dealings within a co-op family, clearly sustains appellant's position that summary judgment should not have been granted by the trial court, and should now be reversed.

In the *Borden* case, the Supreme Court finds the Sherman Act not modified by the Capper-Volstead Act:

"We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914, had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the anti-trust laws should not be construed to forbid members of such organizations 'from lawfully carrying out the legitimate objects thereof.' They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922, was made applicable as well to cooperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in Section one as producers of agricultural products, 'as farmers, planters, ranchmen, dairymen, nut or fruit growers.' They are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. They may have 'marketing agencies in common', and they may make 'the necessary contracts and agreements to effect such purposes.'

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." 308 U.S. at 204-205, 84 L. Ed. 193-194.

4. T.C.C.A., as a cooperative, is liable for violation of the conspiracy provisions of the antitrust laws if its predatory practices and anti-competitive conduct go beyond the LAWFUL pursuit of LEGITIMATE objectives.

Section 6 of the Clayton Act exempts agricultural cooperatives from application of the antitrust laws only when they are "lawfully carrying out the legitimate objects" of the association.[16] The complaint clearly charges the defendants with predatory commercial conduct inconsistent with the obvious intention of Congress in affording *legitimate* cooperative activities the protection of Section 6 of the Clayton Act and of the Capper-Volstead Act.

In *April* v. *National Cranberry Association* (US DC Mass. 1958) 168 F. Supp. 19, 1958 C.C.H. Trade Cases, para. 69,218, the court reviews the legislative history of the Capper-Volstead Act and concludes:

> "I can think of no purpose to be served by permitting cooperatives to use unfair methods to put competitors out of business. To permit this would award agricultural cooperatives a very substantial 'privilege or special favor', contrary to the bill's announced purpose and the disclaimers of its sponsors. In the absence of specific language in the act to the contrary, I hold that when Capper-Volstead provided that a cooperative and its members were not to be prohibited from 'lawfully carrying out the legitimate objects thereof . . .' (to use the language of Section 6 of the Clayton Act), at least it did not make lawful purely predatory practices seeking to monopolize, forbidden to an individual corporation,

[16] See footnotes 13 and 15 supra.

nor did it deprive the victims of such practices effected with monopolizing intent of their private right of action under Section 4 of the Clayton Act." 58 C.C.H. Trade Cases at p. 74,793.

Section 6 of the Clayton Act, the fountainhead of all immunity for cooperative associations, merely exempts cooperatives when they are LAWFULLY pursuing their LEGITIMATE objectives. [17] The Capper-Volstead Act lists the LEGITIMATE objectives of agricultural cooperatives as "processing, preparing for market, handling, and marketign". It describes the LAWFUL means for carrying out their objectives as "marketing agencies in common" and making "the necessary contracts and agreements to effect . . . [the above] purposes." This language was not intended to immunize predatory practices and competition stifling measures as have been alleged in the amended complaint. This is obvious from the discussion by Mr. Justice Black in *Maryland and Virginia Milk Producers Assn.* v. *United States,* (1960), 362 U.S. 458, 4 L. Ed. 2d 880.

Here, the anti-competitive activities charged in the complaint are indeed outside the *legitimate* objectives of a cooperative and, if proved, would constitute a clear violation of Sections 1 and 2 of the Sherman Act.

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[17] In the first reported case dealing with cooperative exemption after passage of the Clayton Act, *United States* v. *King,* 250 Fed. 908 (1916), the court denied immunity to a cooperative with the following comments:

". . . I do not think that the coercion of outsiders by a secondary boycott, . . . can be held to be a lawful carrying out of the legitimate objects of such an association . . . they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations." 250 Fed. at 910.

That the exemptions granted to labor unions and agricultural organizations by Section 6 of the Clayton Act are clearly limited to the lawful means of achieving legitimate purposes of these organizations and to inter-organizational dealings, has been very recently buttressed by the United States Supreme Court decisions in *United Mine Workers of America* v. *James M. Pennington,* decided June 7, 1965, — U.S. —, 14 L. Ed. 2d 626, 1965 C.C.H. Trade Cases, Para. 71,462, and *Meat Cutters Union* v. *Jewel Tea Co., Inc.,* decided the same day, — U. S. —, 14 L. Ed. 2d 640, 1965 C.C.H. Trade Cases, Para. 71,463.

In the recent case of *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers,* decided by the United States District Court in Missouri, on March 26, 1965, 1965 C.C.H. Trade Cases, Para. 71,466, the Court also limited the exemptions from the antitrust laws granted to agricultural cooperatives by Section 6 of the Clayton Act and the Capper-Volstead Act as not applying to certain activities beyond the immediate cooperative family.

Summary judgment, on the record here, is not proper, and should be reversed.

5. Defendant McMinimee is personally liable if proven an "independent actor" and co-conspirator; he is not immune from liability under the antitrust laws merely by reason of his role as attorney of T.C.C.A.

In *Cott Beverage Corp.* v. *Canada Dry Ginger Ale, Inc.* (S.D. N.Y. 1956) 146 F. Supp. 300 [appeal dismissed on other grounds, 243 F.2d 795], 1956 C.C.H. Trade Cases, Para. 65,531, the court dealt with the prob-

6. That genuine issues of fact, to be resolved by trial, are present here with respect to each of the touchstones of liability under the conspiracy provisions of the antitrust laws, is borne out by the record. Moreover, on appeal from summary judgment, appellant's version of matters of fact is presumed correct in this court.

The fact in this record, that the trial court denied summary judgment as to the attempted monopolization charge (second claim of plaintiff's second amended complaint) while allowing summary judgment for defendants as to the conspiracy charges (first claim), prompts an examination of the distinction between the two claims.

The record indicates that the factual allegations and averments in affidavits submitted by plaintiff are practically identical in both claims (R. 380 ff); defendants moved for summary judgment against both claims (R. 391); the court drew a distinction between the two claims, as shown in the court's order (R. 409, 437) dismissing one, by way of summary judgment, and permitting the other to go to trial.

The record here indicates that the trial court,—erroneously, we submit,—predicated its allowance of summary judgment on an assumed immunity of defendants from the conspiracy provisions of Sections 1 and 2 of the Sherman Act, while acknowledging the lack of immunity of an agricultural cooperative from the attempted monopolization charge under *Maryland and Virginia Milk Producers Asso.* v. *U. S., supra.* The one distinction between the elements of the two offenses charged

by plaintiff, one the conspiracy, the other the attempted monopolization, is the requirement for an "outside" party in the conspiracy charge (R. 85-90; 378). Appellant submits that an "outside" party is pleaded and alleged to have been a party to the conspiracy (R. 381-382): Alpenrose Dairy, Inc.; this allegation is supported by affidavits (R. 330-337, 338-339, 347) and certain defendants' answers to plaintiffs' interrogatories in the record (R. 298-299, 319, 323, 327) as well.

The fact that Alpenrose Dairy, Inc. is not an actual or potential member of the cooperative family of T.C. C.A., qualifying for the inter-organizational immunity under the *Sunkist* rationale, is obvious, and admitted by defendants (R. 398).

Moreover, plaintiff contends that Defendant Warren A. McMinimee may also be an outside party, if found on trial to have acted beyond the scope of mere legal adviser as attorney for T.C.C.A.; in view of the admitted character of Alpenrose Dairy, Inc. as an outside party, this issue as to Mr. McMinimee need not here be resolved; the presence of either as a participant in the combination or conspiracy suffices to hold defendants liable for the predatory anti-competitive practices charged by plaintiff.

Appellant concedes, *arguendo,* that its version of the facts may not prevail upon trial, but, in this court, and at this time,—on appeal from a summary judgment,—appellant's version of the facts must be accepted by this court for the purpose at hand. *Mahler* v. *U. S.* (3 Cir. 1962) 306 F.2d 713, cert. den. 371 U.S. 923, 9 L. Ed. 2d

231; *Jacobson* v. *Maryland Casualty Co.* (8 Cir. 1964) 336 F.2d 72; *Cross* v. *United States* (2 Cir. 1964) 336 F.2d 431;

Tracerlab, Inc. v. *Industrial Nucleonics Corporation* (1st Cir. 1963) 313 F.2d 97:

> "This appeal, coming to us after the trial judge's grant of a motion for summary judgment, gives rise to the familiar principle that: '* * * a reviewing court must view the evidence in the light most favorable to the party against whom the motion has been granted, according that party the full benefits of all favorable inferences that may be drawn from the evidence in determining whether there exists a genuine issue of material fact.' Atlas v. Eastern Air Lines, Inc., et al., 311 F.2d 156 (1st Cir., 1962), and cases cited therein." at p. 99.

In this Court the same rule has been adopted:

> "While the pleadings and affidavits raise certain disputed questions of fact, they must all be resolved in favor of appellants for the purpose of considering the motion for summary judgment and the appeal therefrom. This is true because a motion for summary judgment is improper where there is left unresolved a genuine issue as to any material fact. Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A." *Carr* v. *City of Anchorage* (9 Cir. 1957) 243 F.2d 482,[18] at 483.

On the record in this case, and in the light of the law applicable here, summary judgment on the first claim

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[18] Cited by this Court since, with approval, in footnote to its opinion in *Sequoia Union High School Dist.* v. *U.S.* (9 Cir. 1957), 245 F.2d 227, 229.

and summary judgment in favor of defendant Warren A. McMinimee on the second claim of plaintiff's second amended complaint, are error, must be reversed, and the cause remanded.

CONCLUSION

The questions before this Court are really quite simple:

Is plaintiff to have the opportunity to submit to trial by jury its charges, as alleged by complaint and on affidavits, and to adduce evidence to support its case?

Or, is plaintiff to be foreclosed by summary judgment, without full pretrial discovery, and before trial, from its day in Court?

Granting that a conspiracy charge under Sections 1 and 2 of the Sherman Act cannot reach mere interorganizational combinations within an agricultural cooperative family, such as T.C.C.A., without the presence of an outside party, appellant submits that at least one undisputed outsider, Alpenrose Dairy, Inc., was a part, and an important part, of the combination or conspiracy which defendants aimed at plaintiff in defendants' effort to snuff out plaintiff's economic life.

The record shows plaintiff has met the test of *Sunkist* and *Borden* v. *U. S.* by all standards applied to review of summary judgments.

Justice can only prevail, and tranquility return to the green pastures of Tillamook County, when all genuine

issues, all disputes between the parties are resolved at the bar of justice, in orderly fashion, and upon full trial.

Appellant asks its day in Court.

We respectfully submit that the summary judgments on appeal should be reversed, and the cause remanded for trial.

Dated: July 16, 1965.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

ERNEST BONYHADI